SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 358

UNITED STATES OF AMERICA *ex rel.* WILLIAM EPTON,

Petitioner,

—against—

ALBERT NENNA, Warden, Manhattan House of Detention for Men,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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It is now seven years since the so-called Harlem riots of July, 1964. The reported violence of those riots pales in the light of domestic history in the intervening period and raises additional doubts as to the correctness of the conviction of petitioner, who was no more than remotely connected to those riots.

William Epton was never physically present at any scene of violence nor were his actions connected in any way to any of the disturbances which actually took place in Harlem. Yet, Epton was the only person to be convicted of a serious crime in the aftermath of July, 1964 in New York. His conviction in January, 1966 for anarchy, for conspiracy to riot and for conspiracy to advocate criminal anarchy and its affirmance in May, 1967 by the

New York Court of Appeals, in an opinion which cavalierly cuts across the line of decisions by this Court since *Gitlow* v. *New York,* 268 U.S. 652 (1925), have alarmed and disturbed legal scholars [see Pet. pp. 6, 7]. The unusual expressions of opinion, both pro and con, that accompanied the refusal of this Court to hear the case in January, 1968 [390 U.S. 29] and this Court's careful abstention (after three arguments) as to the merits of basic issues in Epton when confronted with them in *Samuels* v. *Mackell,* 401 U.S. 66 (1971) mark those issues as substantial. It is also understandable that the troubled lower courts would affirm the status quo (although understandably extending bail) in the expressed hope that this Court will at last reach the merits of the issues.

Respondent has furnished this Court with fifty-one pages[1] of rebuttal to the Petition; the so-called rebutal amounts to an attempt to prejudice the Court against the petitioner with material loosely related to the record before the Court and to downgrade the constitutional issues before the Court in this case, issues involving fundamental considerations of due process and the First Amendment which have always been the lively concern of this Court. Nonetheless, even as posed by the respondent, the issues assert their importance.

1. *Was the grand jury that indicted the petitioner unconstitutionally impaneled?* [Resp. Br. pp. 2, 31]

This Court has on October 12, 1971 denied review in *U. S. ex rel. Chestnut* v. *Criminal Court,* —— U.S. ——, where the only issue presented was the constitutionality

[1] Respondent filed an additional twenty-seven pages in discussing Point I, the grand jury issue in *United States ex rel. Chestnut* v. *Criminal Court,* OT 1971 Misc.

of the composition of the grand jury which indicted the petitioner. The reason for the refusal to consider the issue is known only to this Court. In *Chestnut*, however, the petitioners had not been indicted by the alleged improperly selected grand jury (only held in contempt thereof); Epton was indicted by that grand jury. All of the Chestnut petitioners had completed service of their sentences; Epton has six months to serve in prison if this Court refuses to act.

2. *Was the petitioner's conviction totally unsupported by evidence, thereby depriving him of due process?* [Resp. Br. pp. 2, 31-35]

Although the specific criminal charges against petitioner were advocacy of the overthrow of the government of the State of New York by force and violence (anarchy) and conspiracy to advocate same and conspiracy to foment a riot "which disturbed the public peace," respondent justifies the conviction as comporting with the evidence "on the theory that [there was] evidence of a clear and present danger of violence [which] was required to support a verdict of guilty." [Resp. Br. p. 31]

In the ensuing discussion, supposedly supporting the sufficiency of the evidence against the petitioner on all counts, respondent makes no argument connecting any of the petitioner's actions either with riot or with the specific advocacy of the overthrow of the government of the State of New York. Respondent's presentation underlines the complete absence of any such proof.

The presentation is aimed exclusively at petitioner's intentions rather than actions, which intentions are manifested exclusively in his speech and pamphleteering. Viz.:

"he organized a group . . . which he *hoped* to 'mobilize' against the police." [Resp. Br. p. 32]

"Though the people he addressed . . . dispersed peacefully, petitioner's *wish* to see violence . . ." [Resp. Br. p. 32]

"Publicly, he and his organization continuously issued and circulated leaflets *inspiring* hatred of the police . . ." [Resp. Br. p. 33]

"In a speech . . . petitioner told his heated audience he *wanted* 'to organize the people of Harlem . . . in a military manner' . . ." [Resp. Br. p. 33]

"He *wanted* the fighting so intensified that the state militia would be called into action." [Resp. Br. p. 33]

"Epton *planned* and *publicized* another street demonstration . . ." [Resp. Br. p. 33]

". . . he *sought* and *expected* to cause the outbreak of more street violence." [Resp. Br. p. 34]

"*The evil of petitioner's intent* . . ." [Resp. Br. p. 34]

"Having missed the first opportunity to take command of a riot, Epton *wanted* to try again." [Resp. Br. p. 34] (*Italics* supplied in excerpts above.)

Respondent's analysis thus clearly demonstrates the insubstantial basis for petitioner's criminal conviction. It explains also why the state found it necessary to amend the conspiracy to riot count of the indictment at the end of the case in order to allege that Epton *intended* to cause a riot, even though a grand jury had lodged an indictment which described his acts of conspiracy as actually having effectuated a riot [see Pet. pp. 16-17].

Moreover it was the same alleged evil intentions of the defendant in connection with the riot that formed the basis (at least in the opinion of the New York Court of Appeals) for his conviction for anarchy [see Pet. 45a, 46a]. Thus, in that opinion, the discussion of "clear and present danger," a supposed *sine qua non* of a conviction for anarchy, is really concerned with riot only. The "clear and present danger" is not that of the overthrow of the government of the State of New York but only the dangers associated with the Harlem riot to which petitioner was attached by nothing more than his expression of his feelings at the time, and not expressed where any acts of riot were taking place.

No matter how parsed, there was simply no evidence that petitioner violated any law as described in the indictment under which he was brought to trial. [See 58a-64a]

3. *Since this Court, in dismissing petitioner's appeal in 1968 on the same record as here, has already either upheld the New York anarchy statutes or determined that their validity should not be reviewed because of the concurrent sentence doctrine, should it now pass upon them in the absence of new facts or law?* [Resp. Br. pp. 2, 35-37]

Respondent maintains that *Benton* v. *Maryland,* 395 U.S. 784 (1969) viewed together with this Court's refusal to review in *Burton* v. *New York,* 402 U.S. 991 (1971) underlines the continuing validity of the concurrent sentence bar to review. It is here submitted that the importance of the issues plus the fact that the anarchy felony conviction rides on a concurrent sentence with the misdemeanor conspiracy conviction [for conspiracy to riot] presents even more compelling reason for this Court to review than was presented to the Court in *Benton* v. *Maryland.*

4. *Are New York's criminal anarchy statutes violative of freedom of speech or unduly vague?* [Resp. Br. pp. 2, 49-51]

Under this heading, respondent goes further than the New York Court of Appeals in arguing the present validity and constitutionality of Penal Law §§160, 161. That court stated:

> "We are thus presented with a statute which is unconstitutional as interpreted. The dissent contends that our decision in *Gitlow* reflects the legislature's intent to make unlawful the mere advocacy of violent revolution, and that we are bound by our prior decision under the doctrine of *stare decisis*. We cannot agree." [Pet. 44a]

Respondent asserts without foundation that the "clear and present danger" doctrine expressly rejected in *Gitlow* had to be read into the state statutes after *Dennis* v. *United States,* 341 U.S. 494 (1951) and *Yates* v. *United States,* 354 U.S. 298 (1951) as a "judicial measure of constitutional applicability." In this argument respondent adopts the arguments of Judge Friendly in *Samuels* v. *Mackell,* 288 F. Supp. 348, expressly not approved by this Court (see 401 U.S. 66 at 73). Moreover, it is hard, except by extreme casuistry, to accept the holding of the New York Court of Appeals in *Epton* after the express language in *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967), holding the definition of anarchy there expressed to be void for vagueness.

5. *Are New York's statutes prohibiting conspiracy to commit the crime of riot constitutionally inapplicable to speech, in circumstances of clear and present danger of violence?* [Resp. Br. pp. 2, 46-49]

It is true that the New York Court of Appeals found that there was a "clear and present danger" of riot [Pet. 46a] even though it could not and did not find there was a "clear and present danger" of the overthrow of the government of the State of New York. Nonetheless there is no record evidence connecting petitioner to acts (even of speech, if speech is an act) of conspiracy to riot which "disturbed the public peace" as alleged in the indictment or even to incite riot as loosely used by the state Court of Appeals.

In this connection, when Mr. Justice Stewart commented in a footnote on the "proof" presented by the state in *Epton* v. *New York,* 390 U.S. 29-30, he was misled as to the actual state of the trial record, which showed absolute failure of proof of facts to support the conspiracy to riot charge as originally framed by the grand jury and which showed that the trial court was compelled to reverse itself on a so-called Molotov cocktail leaflet [cited by Mr. Justice Stewart] which was prejudicially admitted into evidence and then later stricken because it could not be connected to the petitioner or his activities. [448, 452, 1022, 1036][2]

It is here submitted that even bad intentions must be protected by the First Amendment if unconnected at trial

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[2] The text which is most prejudicial if believed and connected to petitioner (which the prosecution failed to do) read:

> "Bulletin No. 1, July 1964. Harlem Freedom Fighters. How to make a Molotov cocktail. Instructions: Empty a Bottle. Fill with gasoline. Use rag as wick. Light rag. Toss and see them run." The leaflet depicted a picture of a bottle stopped with a rag [453].

with any substantial evidence and previously charged illegal activity.

6. *Was the petitioner unconstitutionally prejudiced by the trial court's amendment of the count charging conspiracy to riot?* [Resp. Br. pp. 2, 49-51]

The importance and the prejudice to petitioner of the illegal amendment of the indictment at the end of the entire case has been argued at length above [pp. 4, 7 *supra*]. Nonetheless, respondent refers to the objection by counsel at trial to that amendment as "frivolous" [Resp. Br. p. 50]. Moreover, even though the trial court was compelled to amend the indictment, evidently because defense counsel had successfully argued the failure of evidence to support the indictment as drafted, respondent states

> "The petitioner, at the time, made no claim that this change in any way affected the presentation of his case . . . nor does he do so in his present brief." [Resp. Br. p. 50]

This is simply not true. Said counsel for the petitioner at the trial in making the motion to dismiss the conspiracy to riot count at the end of the case:

> "I submit, your honor, that on the basis of your disposition of count 2,[3] namely that there was no proof that the defendant aided or abetted anyone, and indeed there was no proof he had anything to do with the riot, I fail to see how this charge could be sustained." [1676]

* * * * *

[3] Count 2 was the substantive riot count framed in identical language as was the conspiracy to riot count and dismissed by the Court at the end of the prosecution's case for failure of proof.

The Court: The theory of the People's case never was, as I found out belatedly, an active participation on the riot scene itself.

Mr. Katz: That is quite true, but to use as your Honor puts it, the qualifying phrase: by instigating, promoting, aiding and abetting. I don't think we can overlook the following qualifying phrase which does not qualify it at all, but describes a completed offense.

The Court: I am going to read that language as if it said "which would disturb" because that's the only way it makes sense.

Mr. Katz: It may be the only way it makes sense, but this is not what the grand jury indicted this defendant for.

The Court: I think it indicates the intention of the grand jury." [1678, 1679]

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The Court: I think Mr. Phillips would be content with your description that they met, they spoke and they leaflet [*sic*].

Mr. Katz: All right, but this is a protected activity under the First Amendment, and I do not think a conviction can be had on such a basis. I know it cannot be had—it would be violative of the First Amendment rights. [1681]

Nor was this a mere failure of proof as to one or more overt acts charged in the indictment. Rather it was a failure of proof as to the crime charged in the indictment.

The "trial judge's verbal change" was an amendment to the indictment made the only way an indictment can be amended—verbally.

No defendant in a criminal case needs or should be subjected to this manner of clarification of issues, else due process becomes a meaningless concept.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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